It has not been shown to me that their reliance on these two cases was wrong. On the other hand, there is confirmation for their view in the case of *Snell* v. *Rosser, Thomas & Co. Ltd.*[4] which was not brought to their attention. In that case, a company whose main business was that of building contractors with powers however of acquiring and disposing of land purchased a house which involved purchasing also 5¾ acres of land. The house was converted and sold. Subsequently the adjoining land was sold. Between the purchase and the sale, nothing was done about the land. Ungoed-Thomas J. on appeal from the commissioners had this to say:

"Here, it has been suggested that this land, as contrasted with Lisvane House itself, must be treated as a separate entity, as subject to separate considerations and, indeed — and I hope I am not doing an injustice to the argument — as though it were acquired and dealt with altogether independently, having nothing to do with the stock-in-trade, which Lisvane House was. That is not the real situation. The real situation here is clearly, to my mind, that it was bought because, and only because, Lisvane House could not be bought without it. It was in that sense incidental to the purchase of Lisvane House. It was never used by the company at all, and was disposed of by the company at the first favourable opportunity. As I read it, therefore, it was simply something incidental to the stock-in-trade, which was disposed of at an early favourable opportunity without being used by the company at all. It was an asset of the company which was never treated as an investment by the company. It never became a fixed asset of the company. It seems to me in accordance with the principles in the cases from which I have quoted that it was part of the stock-in-trade of the company, and that on its sale the receipt should properly be treated as an income receipt of the company."

In my view, the case before me is a much stronger case. The land that was bought was stock-in-trade for the purposes for which it was intended. It was in the words of Lord Greene M.R. in *Imperial Tobacco Co. Ltd.* v. *Kelly*,[5] "an essential part of a contemplated commercial operation."

I therefore hold that on the evidence the Special Commissioners were entirely justified in coming to the conclusions that in selling the land Paramount Ltd. was carrying on the business of dealing in real property and the profits from the sale were chargeable to income tax under section 10(1)(a) of the Income Tax Ordinance 1947.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Mah & Kok.*

ELIATHAMBY v. SHEIKH MOHAMED BIN SAID

[O.C.J. (Sharma J.) March 15, 1970]

[Muar — Originating Summons No. 283 of 1968]

Land Laws — Charge — Notice for repayment not only of principal but also of interest — Charge executed not providing for payment of principal sum on demand — National Land Code, 1965, ss. 254 and 255 and Forms 16D and 16E — Notice under s. 255 in the Form 16E — Notice should have been given under s. 254 and in the Form 16D.

This was an application by the chargee for an order for sale of the land charged to him by the chargor as a security for the loan taken by him. The respondent raised a preliminary objection as to the validity of the notice given by the applicant under section 255 of the National Land Code.

Held: as the charge executed to the respondent was not a charge in which the principal sum secured was payable on demand and to which section 255 of the National Land Code applied, the only valid and effective notice which the applicant was entitled to give was the notice under section 254 of the National Land Code and as he had failed to do this the application must be dismissed.

[Editorial Note: See however *V.A.M. Hussain* v. *BP Malaysia Bhd.*, *ante*, p. 69, F.C.]

Cases referred to:-

(1) *Hardial Singh* v. *Harbans Singh* [1954] M.L.J. 134.

(2) *R. M.S.T. Somasundram Chetty* v. *Ng Sin Tan* (1923) 3 F.M.S.L.R. 205.

ORIGINATING SUMMONS.

Elyas Majeed for the applicant.

M. Thiruchelva Segaram for the respondent.

Sharma J.: This is an application by the chargee for an order for sale of the land charged to him by the chargor as a security for the loan taken by him. For the purposes of this judgment it is not necessary to go into the details of the transaction between the parties or to deal with facts disputed by them. The charge was executed on June 6, 1963 and registered on June 15, 1963. The charge provided for repayment, on a specified date, of the principal sum and for payment of interest every month on a date certain and in case of default in the payment of the instalments due on account of interest "the whole of the amount then owing under" the charge was to "become immediately due and payable." The chargor made default and on the 19th day of December, 1967, the solicitors for the chargee sent a notice to the chargor under section 255 of the National Land Code, 1965. The notice was in Form 16E of the First Schedule to the National Land Code. Form 16E is prescribed under section 255 and is confined to cases where the *principal sum* secured by the charge is *payable on demand*. The form itself bears the heading "Demand for Payment of a Principal Sum" and speaks of "the principal sum secured by the charge . . . payable on demand."

Section 255(1) of the National Land Code reads as follows: —

"Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under sub-section (1) of section 254."

The marginal note to section 255 suggests that the section deals with a special provision with respect to sums payable on demand. Section 254 of the National Land Code deals with "any charge" and the charge referred to in section 254 is unqualified as to its quality and provisions. Section 254 is a general provision whereas section 255 deals with a special provision for a special type of charge. The notice prescribed under section 254 is in Form 16D and the primary object of that notice is to give the chargor an opportunity to remedy the breach specified in the notice within one month of the service of that notice on him. It is only

when the breach referred to in the notice is not remedied within the time limited by section 254 that the chargee is entitled to take proceedings for an order for sale of the land — not until then. Notice in Form 16D is thus a statutory notice prescribed by the National Land Code and which is applicable to any breach of agreement, express or implied, in any charge and the service of that notice is a prerequisite to the chargee initiating any proceedings for sale of the land in question. The breach under section 254 may be any breach whether in the payment of interest or principal or in making default in the payment of the whole amount including interest which may have fallen due or in the non-observance of any of the conditions and stipulations in the charge. Notice in Form 16D gives the chargor an opportunity to remedy the breach. Notice in Form 16E gives an opportunity to pay the *principal sum* which is secured by the charge and which is *payable on demand*. Notice in Form 16E is the mode prescribed for making the demand under section 255 and once that notice is served on the chargor and he does not pay the sum, *i.e.* the *principal sum* within one month of the date of the service on him of the notice, the chargee then becomes entitled to apply either to the court or the collector for an order for sale of the land without having to serve another notice in Form 16D under section 254 (for comparison see sections 138 and 139 of the repealed Land Code (Cap. 138)).

Now the principal sum constitutes the original sum which was lent and which on being lent yields interest to the chargee. The meaning given to it in the *Shorter Oxford* English Dictionary is that of the original sum dealt with in any transaction as distinguished from any later accretions; it is the capital sum as distinguished from interest.

If the principal sum secured by the charge is payable on demand it can only be so by virtue of an agreement between the chargor and the chargee. In such a case a demand by the chargee is a condition precedent to the liability of the chargor and the coming into existence of the chargee's rights under the charge or under the National Land Code. There is a clear distinction between a right which is a present enforceable right and a right which is not enforceable until after demand.

When this application came up for hearing the counsel for the respondent raised a preliminary issue as to the validity of the notice given by the applicant under section 255 of the National Land Code. The notice served on the respondent was not for repayment only of the principal sum lent; it also included interest. The charge executed by the respondent was not a charge to which section 255 of the National Land Code applied. The only valid and effective notice which the applicant was entitled to give was the notice under section 254 of the National Land Code and this he failed to do. (See *Hardial Singh* v. *Harbans Singh*[1] and *R.M.S.T. Somasundram Chetty* v. *Ng Sin Yan*[2]).

The respondent succeeds on the preliminary issue. The application is dismissed with costs.

Application dismissed.

Solicitors: *Elyas Majeed & Co.*; *M. Segaram & Co.*

WOLFGANG PZETZHOLDT v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) April 10, 1970]

[Malacca — Criminal Appeal No. 4 of 1970]

Customs and Excise — Prohibited goods — Knowingly in possession of prohibited goods — Knowingly concerned in dealing with uncustomed goods — Knowledge — Mens rea — Customs Act, 1967, ss. 135(1)(d) and 133(1)(e).

This was an appeal against the conviction of the appellant on two charges under the Customs Act, 1967 of (a) knowingly being in possession of prohibited goods under section 135(1)(d) of the Customs Act, 1967 and (b) knowingly being concerned in dealing with uncustomed goods under section 135(1)(e) of the Customs Act, 1967. The appellant in his defence had stated that he obtained the walkie talkies, the subject of the charges, in Singapore and that he had been allowed to bring the goods into Malaysia with him in the bus in which he was travelling as a passenger. On arriving at Malacca he went to see the chief police officer with the object of selling the walkie talkies to the police. The appellant was told that the police got their walkie talkies from their headquarters and that he should if he wanted to sell them, try some local shop. Neither the appellant nor his witness was cross-examined by the prosecution.

Held, allowing the appeal: (1) as regards the first charge under section 135(1)(d) of the Customs Act, 1967, the learned president in this case had not adequately considered the import and significance of the word "knowingly" in the definition of the offence and had not directed his mind at all to the absence of cross-examination of the appellant and his witness and to the quantum of proof which the law requires an accused person to rebut a statutory presumption;

(2) the second charge under section 135(1)(e) of the Customs Act, 1967 required not only knowledge but an intent to defraud the Government of the duty payable or to evade any prohibition under the Act or to evade the prohibition applicable to the goods concerned and in this case the prosecution had not shown that the appellant had such knowledge or intent.

Cases referred to:-

(1) *Frailey* v. *Charlton* [1920] 1 K.B. 147.

(2) *Gaumont British Distributors, Ltd.* v. *Henry* [1939] 2 K.B. 711.

(3) *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918.

(4) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.

(5) *R.* v. *Dolman* [1949] 1 All E.R. 813.

(6) *Evans* v. *Bartlam* [1937] 2 All E.R. 646.

MAGISTRATE'S CRIMINAL APPEAL.

J. Nadchatiram for the appellant.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent.

Sharma J. (delivering oral judgment): On the 28th February 1970 at about 12 noon the appellant went to a radio shop in Malacca. He had with him 4 pairs of walkie talkies. The Superintendent of Customs, P.W. 1, was waiting in the back room of the radio shop with a customs officer. The appellant placed the walkie talkies on the counter and in came P.W. 1 who identified himself and asked the appellant what he had. The appellant in answer to questions put by him very candidly